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No. 84-1371

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1985

FARWEST STEEL CORPORATION, Petitioner,

v.

S.A. DeSANTIS, an individual; LAKEVIEW CHARTERS, a partnership; WEST COAST CHARTERS, INC., a Delaware corporation; CARNATION COMPANY; and BANK OF AMERICA, N.T. & S.A., Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

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LIST OF PARTIES

Petitioner states in a footnote under "List of Parties" that the Barge SEASPAN 241, aka CERES, her tackle, apparel and furniture, was among the parties appearing before the Washington Superior Court, but that it (among others) did not appear or participate in the appeal to the Court of Appeals of the State of Washington, Division II, which was certified to the Washington Supreme Court.

This is not accurate. Counsel for Respondents appeared and participated on behalf of the barge, in rem, both in the appeal to the Court of Appeals of the State of Washington, Division II, and before the Washington Supreme Court.

Petitioner concedes (Petition, p.10) that it instituted the Washington proceeding to foreclose a lien [against the barge] granted by the Washington Vessel

Lien Law, and, alternatively, that it sought foreclosure of a chattel lien pursuant to R.C.W. Chapter 60.08. The fact that the caption of Petitioner's proceeding in Washington did not specifically name the barge is immaterial where the contents of its pleadings and the thrust of its position constitutes an attempt at foreclosure in rem. See, Stephens v. Weyl-Zuckerman & Co., 34 Cal. App. 210, 216, 167 P. 171 (1917); In re Mission Marine Assocs., Inc., 633 F.2d 678 (3d Cir. 1980); United States v. Fishing Vessel ZARCO, 187 F. Supp. 371 (S.D. Cal. 1960).

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FARWEST STEEL CORPORATION, Petitioner,

v.

S.A. DeSANTIS, an individual; LAKEVIEW CHARTERS, a partnership; WEST COAST CHARTERS, INC., a Delaware corporation; CARNATION COMPANY; and BANK OF AMERICA, N.T. & S.A., Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

ARGUMENT

1. Introduction

The Washington Supreme Court correctly concluded that any state statute which creates a lien on a vessel for claims relating to repairs, supplies or other necessaries is preempted by the Federal Maritime Lien Act. The Washington Supreme Court correctly applied the Maritime Lien Act in a fashion entirely consonant with the intent of Congress. There was no deprivation of state remedies under 46 U.S.C. § 975.

2. Reasons for Refusing to Grant Certiorari

Rule 17 of the U.S. Supreme Court Rules prescribes that a review on writ of certiorari is a matter of judicial discretion and will be granted only when there are special and important reasons therefor, and indicates the character of reasons that will be considered.

Subsection (a) of Rule 17 refers to decisions of federal courts of appeal and is inapplicable to the instant Petition.

Subsection (b) refers to a decision by a state court of last resort in conflict with the decision of another state court of last resort or of a federal court of appeals. The decision of the Washington Supreme Court in this proceeding is not in conflict with the decision of another state court of last resort nor of a federal court of appeals... and the Petition fails to cite any authority in support of review on this basis.

Subsection (c) reads in relevant part:

> When a state court...has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with the applicable decisions of this Court.

The Petition does not claim or assert that the Washington Supreme Court has decided an important question of federal law

which has not been, but should be, settled by this Court. To the contrary, the thrust of the Petition is that the Washington Supreme Court has decided a federal question in a way in conflict with the applicable decisions of this Court, citing inter alia, Rounds v. Cloverport Foundary & Machinery Co., 237 U.S. 303, 35 S. Ct. 596, 59 L.Ed. 966 (1915) and Leon v. Galceran, 11 Wall 185, 78 U.S. 185, 20 L.Ed. 74 (1870).

Petitioner asserts (Petition, p. 23):

> Petitioner filed an in personam action against the owners of the vessel. The attachment proceeding directed against the vessel was ancillary to the in personam action and may legitimately be imposed by a state court. Such an action does not infringe upon the exclusive jurisdiction of the federal court.

This assertion is palpably erroneous.

Petitioner's original Complaint in the Clark County Superior Court alleged, in part:

XI

> Pursuant to the provisions of R.C.W. 60.36.010, Plaintiff is entitled to a lien on the barge and to have the same seized and sold and the proceeds applied to satisfy Plaintiff's lien.

In the Prayer to that Complaint, Petitioner asked:

* * *

> 2. That the Court decree that Plaintiff has a valid subsisting lien on the barge SEASPAN 241, also known as CERES:

* * *

> 5. That the Court order the Barge SEASPAN 241, also known as CERES, to be seized and sold by the sheriff and from the proceeds of sale to pay and satisfy said lien of the Plaintiff; * * *

Petitioner's Amended Complaint in the Clark County Superior Court contained the same identical allegations.

Petitioner did, in the course of the proceedings in the Washington trial court, ask that a restraining order be issued to defendants S.A. DeSantis, Lakeview Charters,

and West Coast Charters, Inc. restraining and enjoining them from selling, assigning, conveying, transferring or mortgaging any interest in and to the barge to a third party and/or removing it from the jurisdiction of Clark County, Washington.

The affidavit in support of Petitioner's application for a restraining order, executed by Lloyd Weisensee, one of Petitioner's counsel, asserted that the purpose of the restraining order was to "protect and ensure plaintiff's lien rights". Further, that the purpose was only to "prevent the defendants personally from any act which would tend to interfere with or impair plaintiff's lien rights asserted under RCW 60.08.010 and RCW 60.36.010".

At no time did Petitioner request, in the Washington state court proceedings, that the barge be attached to afford security for the payment of any personal judgment which it might later be able to

secure against the individual defendant owners of the barge. The Washington Trial and Supreme Courts correctly recognized petitioner's action as an attempt to foreclose an in rem lien claim. See In re Mission Marine Assocs., Inc., supra; United States v. Fishing Vessel ZARCO, supra, and Stephens v. Weyl-Zuckerman & Co., supra.

Even assuming, for the purposes of argument, that Rounds was rightly decided, and that in appropriate circumstances a plaintiff could secure a pre-judgment attachment in a suit in personam based upon a claim for payment of materials furnished to repair a vessel, Petitioner did not ask for a pre-judgment attachment of the barge. Moreover, the trial court found (and the Washington Supreme Court affirmed) that, as a matter of fact, Petitioner was not entitled to judgement in personam against respondent owners of the barge because there was never any

direct contractual relationship between Petitioner and the respondent owners of the barge. Instead, Petitioner dealt only with the shipyard contractor and sold the materials to the shipyard contractor on open account. Only if R.C.W. 60.36.010(2) applied could Petitioner "bootstrap" itself into a valid in personam claim by relying on that portion of that statute providing that "every contractor, builder or person having charge, either in whole or in part, of the construction, alteration, repair or equipment of any steamer, vessel or boat, shall be held to be the agent of the owner for the purposes of RCW 60.36.010 and 60.36.020..." Here, however, Petitioner was precluded from reliance upon that portion of the statute because of the holding in The Roanoke, 189 U.S. 185, 23 S.Ct. 491, 47 L.Ed. 770 (1903).

3. There is no reason for this Court to delay ruling on this Petition until the Ninth Circuit renders its decision in the companion case.

Notwithstanding Petitioner's arguments to the contrary (Petition, P. 31-32), it is immaterial whether the contract between Petitioner and Nichols Boat & Barge Builders, Inc. [the shipyard contractor] was maritime or non-maritime. The seminal question is whether or not the facts support a conclusion that Nichols....the only party with whom Petitioner had any contractual dealings...was one of the "persons" presumed under 46 U.S.C. § 972 to have authority from the owner to procure repairs, etc. And here, the U.S. District Court and the Washington courts all concluded based upon the facts that Nichols was not...." the managing owner, ship's husband, master, or any persons to whom the management of

the vessel at the port of supply is intrusted.***"

CONCLUSION

Petitioner cannot bring itself within the ambit of Rule 17.

The Washington Supreme Court has not decided a federal question in a way in conflict with applicable decisions of this Court.

The Washington Supreme Court was correct in its interpretation of the scope of the Federal Maritime Lien Act and concurrent state jurisdiction.

The Petition should be denied.

Respectfully submitted,

ALEX L. PARKS
C. KENT ROBERTS
PARKS, MONTAGUE, ALLEN & GREIF

HUGH A. KNAPP
KNAPP, O'DELL & PINKERTON

By: /S/
ALEX L. PARKS
Of Attorneys for Respondents

IN THE SUPERIOR COURT OF

THE STATE OF WASHINGTON

FOR THE COUNTY OF CLARK

FARWEST STEEL CORPORATION,	)	
Plaintiff,	)	No. 812019823
v.	)	AFFIDAVIT OF LLOYD W. WEISENSEE IN SUPPORT OF MOTION FOR ORDER TO SHOW CAUSE
S.A. DeSANTIS, an individual; LAKEVIEW CHARTERS, a partnership; and WEST COAST CHARTERS, INC., a Delaware corporation,	)	
Defendants.	)	

STATE OF OREGON)
) ss.
County of Multnomah)

I, LLOYD W. WEISENSEE, being first duly sworn depose and state that I am an attorney admitted to practice in Oregon and am one of the counsel for Farwest Steel Corporation in this matter; defendants have no office, place of business, or assets within the state of Washington, except the barge SEASPAN 241, aka CERES.

I further have reason to believe that

the barge SEASPAN 241, aka CERES, is the only asset of the defendant West Coast Charters, Inc. I am informed and believe that defendants have a proposed agreement with the Carnation Company to sell the barge to the Carnation Company, whereupon the barge would be moved from Clark County, Washington.

To protect and ensure plaintiff's lien rights this court should issue a restraining order prohibiting any act of sale, etc., to Carnation Company or anyone, or movement of the barge until and except upon order of this court.

The barge is presently in custody of the U. S. Marshal pursuant to a warrant of arrest issued by the United States District Court for the District of Oregon. The restraining order would not be an assumption of custody of the barge or an attempt to interfere with the in rem jurisdiction of the U.S. Court, but only prevent the de-

fendants personally from any act which would tend to interfere with or impair plaintiff's lien rights asserted under RCW 60.08.010 and RCW 60.36.010.

Attached hereto are true copies of the affidavits of Stan Zeggert (Exhibit A) and Gene Sage (Exhibit B). Said affidavits verify that plaintiff delivered steel which was incorporated into defendants' barge.

Further deponent sayeth not.

/s/ Lloyd W. Weisensee
Lloyd W. Weisensee

Subscribed and sworn to before me this 21st day of October, 1981.

/s/ Brenda S. Wilcox
Notary Public for Oregon
My Commission Expires: 11-18-82

IN THE SUPERIOR COURT OF

THE STATE OF WASHINGTON

FOR THE COUNTY OF CLARK

FARWEST STEEL CORPORATION,	)	
Plaintiff,	)	No. 812019823
v.	)	COMPLAINT FOR FORECLOSURE OF CHATTEL LIEN AND INJUNCTION
S.A. DeSANTIS, an individual; LAKEVIEW CHARTERS, a partnership; and WEST COAST CHARTERS, INC., a Delaware corporation,	)	
Defendants.	)	

Plaintiff alleges:

FIRST CLAIM FOR RELIEF

I.

Plaintiff is an Oregon corporation with its offices and principal place of business in Eugene, Oregon.

II.

Defendant WEST COAST CHARTERS, INC., is a Delaware corporation. Defendant S.A. DeSANTIS is a shareholder, officer and managing agent of WEST COAST CHARTERS,

INC. The defendants are the owners, operators and managers of the Barge SEASPAN 241, also known as the Barge CERES. The barge is now located within Clark County, Washington, and has been at all times material herein.

III.

On or about August 29, 1980, Plaintiff commenced delivery of steel plate, angles and bars to Nichols Boat & Barge Builders, Inc., at Vancouver, Clark County, Washington, for use in repair and reconstruction of the barge. Plaintiff furnished materials for use in the barge having an agreed reasonable value of $434,857.83. The sum of $179,768.44 remains due and unpaid.

IV.

The Plaintiff had heretofore demanded of Defendants that they pay to Plaintiff the aforementioned amount, but Defendants have neglected and refused to pay the same or any part thereof.

V.

That within sixty days from the date of delivery of such property to the Defendants, Plaintiff filed in the office of the Auditor of Clark County, Washington, a lien notice, the same being instrument No. 8110220212, a copy of which is attached hereto, marked Exhibit A, and by reference incorporated herein as if fully set forth.

VI.

That less than nine months have elapsed between the filing of said lien notice and the commencement of this action.

SECOND CLAIM FOR RELIEF

Plaintiff alleges:

VII.

Plaintiff realleges and incorporates paragraphs I through VI of its First Claim for Relief.

VIII.

Defendants have been unjustly enriched by the incorporation of the steel supplied

by Plaintiff, and Plaintiff is entitled to be paid the reasonable value of the steel, or the enhanced value of the barge, whichever is greater, not to exceed $179,768.44.

THIRD CLAIM FOR RELIEF

Plaintiff alleges:

IX.

Plaintiff realleges and incorporates paragraphs I, II, IV and V of its First Claim for Relief.

X.

On or about August 29, 1980, Plaintiff commenced delivery of steel plates, angles and bars to Nichols Boat & Barge Builders, Inc., at Vancouver, Clark County, Washington, for use in construction, alteration and equipment of the barge. Plaintiff furnished materials for use in the barge having an agreed and reasonable value of $434,857.83. The sum of $179,768.44 remains due and unpaid.

XI.

Pursuant to the provisions of R.C.W. 60.36.010, Plaintiff is entitled to a lien on the barge and to have the same seized and sold and the proceeds applied to satisfy Plaintiff's lien.

FOURTH CLAIM FOR RELIEF

Plaintiff alleges:

XII.

Plaintiff realleges and incorporates paragraphs I through IV of its First Claim for Relief.

XIII.

The Plaintiff is informed and believes, and therefore, alleges that the Defendants have a proposed agreement with the Carnation Company to sell the barge, and unless restrained, the barge would be removed from the jurisdiction of Clark County, Washington. There is no plain, adequate or speedy remedy at law available to the Plaintiff, and the Plaintiff will suffer irreparable

damage unless the Defendants are restrained from selling, assigning, conveying, transferring, or mortgaging any interest in the barge, or moving the barge SEASPAN 241, also known as CERES, from Clark County, Washington, pending trial of this case or further order of this Court.

WHEREFORE, Plaintiff prays:

1. That Plaintiff have judgment against Defendants for the sum of $179,768.44, with interest from June 29, 1981;

2. That the Court decree that Plaintiff has a valid subsisting lien on the Barge SEASPAN 241, also known as CERES;

3. That Plaintiff be granted a temporary injunction during the pendency of this proceeding, restraining the Defendants from selling, assigning, conveying, transferring or mortgaging any interest in and to the Barge SEASPAN 241, also known as CERES, to a third party

and/or removing said barge from the jurisdiction of Clark County;

4. That Plaintiff be granted a permanent injunction restraining the Defendants from selling, assigning, conveying, transferring or mortgaging any interest in and to the Barge SEASPAN 241, also known as CERES, to a third party and/or removing it from the jurisdiction of Clark County.

5. That the Court order the Barge SEASPAN 241, also known as CERES, to be seized and sold by the sheriff and from the proceeds of sale to pay and satisfy said lien of the Plaintiff; and

6. For such other and further relief as may be just and proper.

DATED this 23rd day of October, 1981.

/s/ JAMES D. LADLEY
JAMES D. LADLEY, of
Counsel for Plaintiff